No. 43837-2-II

IN THE COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

PILCHUCK CONTRACTORS, INC.,

Appellants,

v.

DAVID D. BERKA AND THE DEPARTMENT OF LABOR AND INDUSTRIES, STATE OF WASHINGTON

Respondents.

RESPONDENT'S BRIEF

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A. INTRODUCTION

This case involves Claimant David Berka's application to reopen his May 2, 2007 industrial injury claim for much needed medical treatment for his injury-related left knee condition pursuant to RCW 51.32.160.

On May 2, 2007, Berka injured his left knee while working for Pilchuck. He had two arthroscopic surgical procedures involving removal of tears and portions of his medial meniscus as a result of this injury. The claim was closed on November 14, 2008, with a permanent partial disability award based on an impairment of 11% of the left lower extremity, but his knee remained symptomatic and disabling at and after claim closure. He experienced ongoing pain, swelling, functional limitation, disability, and walked with a limp at and after closure. Berka, 38. His knee pain and disability continued to worsen throughout the remainder of 2008, and throughout January and February of 2009. Berka 42-43. By then, any activity, even walking, hurt his knee. Berka, 49.

Berka's employment at Pilchuck ended on January 27, 2009, and he moved his family to Arizona on February 3, 2009. Berka, 41. Before he left Washington for Arizona on February 1, 2009, he had already secured a job with a new employer in Arizona, Northern Pipeline, over the phone but he postponed his actual start date until March 2, 2009, due to

the disabling condition of his left knee. He hoped the rest would improve his condition. Berka, 43-44.

Also in February 2009, before he actually started work in Arizona, Berka contacted Pilchuck's safety officer, Mark Wauldron, by phone about reopening his industrial injury claim because of the worsening of his knee condition. Berka, 45-46. In February 2009, he also contacted his claims manager at the Department and started the difficult process of finding a doctor or clinic in Arizona who would handle a Washington industrial injury claim. Berka, 47-48. Soon thereafter, he found Dr. Marcus and Dr. Stacey McClure at the CORE Institute, but due to scheduling, he was not able to get in for his first appointment until April 15, 2009. Berka, 48. While he waited for his medical appointment, he commenced work as a backhoe operator for Northern Pipeline in Arizona on March 2, 2009. Berka, 44. An application to reopen his claim was finally filed with Pilchuck and the Department on April 7, 2009.

The claim was reopened by the Department of Labor & Industries (Department), and the Employer Pilchuck Contractors, Inc. (Pilchuck), appealed that decision to the Board of Industrial Insurance Appeals, contending that the worsening of Berka's knee condition was due either to an alleged new and unreported industrial injury that occurred some time after he started work in Arizona on March 2, 2009, or due to the less than

five weeks of work he did at Northern Pipeline. The record does not support either of these contentions. After hearings, the Board affirmed the decision of the Department, which reopened Mr. Berka's May 2, 2007 claim. BR 2-4; CP 2-3.

Pilchuck then appealed the Board's decision to the Superior Court. The trial was held before the Hon. Ronald E. Culpepper on June 25-27, 2012, and all evidence and testimony was presented at the Superior Court. The judge heard all of the testimony read from the record by the parties, and he personally read the certified appeal record of every word of testimony himself as the trial proceeded in front of him.

At the conclusion of the presentation of all evidence in the certified appeal record, before the presentation and argument of jury instructions, and before the case was given to the jury, Berka made an oral Motion for Directed Verdict or Motion for Judgment as a Matter of Law pursuant to CR 50(a). After hearing the evidence and argument of counsel, the Superior Court granted Berka's Motion for Directed Verdict/Motion for Judgment as a Matter of Law pursuant to CR 50(a). CP 63-65, 66-72. The Superior Court correctly found that there was no legally sufficient evidentiary basis for a reasonable jury to conclude that the Board of Industrial Insurance Appeals was incorrect in deciding that between November 14, 2008 and August 14, 2009, Berka's left knee condition

proximately caused by the May 2, 2007 industrial injury had worsened and was in need of further treatment. CP, 64. The Superior Court correctly found that the Board was correct as a matter of law. CP 6, ll. 18-22. The Superior Court correctly dismissed Pilchuck's appeal with prejudice and remanded the claim back to the Department for further action. CP, 64, BR. 2-4.

The case now comes to this court on Pilchuck's appeal of the July 19, 2012 Order of the Pierce County Superior Granting Berka's CR 50(a) Motion Judgment as a Matter of Law. CP 63-65, 66-72.

Pilchuck's arguments are fundamentally flawed, and its case is not based on any substantial evidence. The record of evidence, the inferences therefrom, the facts, and all of the testifying medical experts opinions, overwhelmingly support the decision of the Superior Court. The facts, the medical testimony and opinion, all support the conclusion that what Pilchuck contends are "new conditions or findings" in Berka's left knee are, in fact, medically predictable and explainable sequelea causally related to his May 2, 2007, industrial injury and the surgical procedures required to treat that injury. There is no evidence whatsoever that Berka had a new, unreported injury in Arizona, or that the five weeks of work he did in Arizona between March 2 2009 and April 7, 2009, caused the stipulated worsening of his already disabling, left knee condition. There is

no medical opinion supporting Pilchuck's contentions and Pilchuck's case is based on pure speculation and no fact. On this basis, Berka respectfully submits that the Order of the Superior Court should be sustained. There is no substantial evidence to support a decision in Pilchuck's favor, or the conclusion that the Board of Industrial Insurance Appeals decision was incorrect. The Superior Court correctly decided this case.

If the Court reverses the Order and remands this case to Superior Court for a new jury trial, Berka requests that the Court refuse to instruct the Superior Court to instruct the jury as proposed by Pilchuck because jury instructions had not yet been presented to or argued to the Superior Court, and the Superior Court did not rule on jury instructions, prior to its ruling on the Motion for Judgment as a Matter of Law. As such, the issue of jury instructions is not properly before this Court. Finally, it is Berka's contention that the supervening cause instruction proposed by Pilchuck is not an appropriate instruction given the facts of this case.

B. RESPONSES TO ASSIGNMENTS OF ERROR

1. The Superior Court did not commit error when it granted Berka's CR 50(a) Motion for Judgment as a Matter of Law.

2. The Superior Court did not commit error when it found no legally sufficient basis existed for a reasonable jury to conclude that the Board of Industrial Insurance Appeals was incorrect in deciding that between

November 14, 2008 and August 14, 2009, Berka's left knee condition, proximately caused by the May 2, 2007 industrial injury, had objectively worsened and was in need of further necessary and proper medical treatment, and when it affirmed the October 19, 2010 Board decision and order reopening Berka's industrial insurance claim.

3. The Superior Court did not commit error when it found, as a matter of law, that the October 19, 2010 Board decision and order reopening Berka's industrial insurance claim was correct.

4. The Superior Court did not commit error when it dismissed Pilchuck's appeal with prejudice.

5. The Superior Court did not commit error when it remanded Berka's claim to the Department for further action consistent with its Order Granting Judgment as a Matter of Law.

6. The Superior Court did not commit error in hearing and granting Berka's CR 50(a) motion as there was no waiver of the application of the Civil Rules at trial in Superior Court and such a ruling was within the authority of he Superior Court.

7. The Superior Court did not commit error and applied the correct standard of review when it ruled on Berka's CR 50(a) motion.

8. The Superior Court did not commit error when it reviewed the evidence in the record as a whole in ruling on Berka's motion.

9. The Superior Court did not commit error in granting Berka's motion after consideration of all of the evidence, and reasonable inferences therefrom, and finding that no reasonable jury could find that the Board decision was incorrect.

10. The Superior Court did not commit error in light of Berka's motion and the court appropriately applied the law on proximate cause and intervening cause to the facts of the case, including Pilchuck's allegation of an intervening cause.

11. The Superior Court did not commit error and applied the appropriate burden of proof when it ruled on Berka's CR 50(a) Motion for Judgment as a Matter of Law.

12. The Superior Court did not commit error by failing to instruct the jury because it had not yet been provided with the parties' proposed instructions, instructions had not yet been argued, and it had not yet instructed the jury at all when it ruled on Berka's CR 50(a) motion. Pilchuck's Assignments of Error on the issue intervening or supervening cause instruction is premature, and not properly before this Court, as the Superior Court made no actual consideration or ruling on jury instructions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The Superior Court had the authority and jurisdiction to rule on Berka's CR 50(a) motion and Berka and the Department did not waive the

right to bring such a motion by not bringing such motion to the Board. Under RCW 51.52.115, the trial in Superior Court is *de novo*, and is based solely on evidence and testimony presented at the Board. Here, the court considered only evidence contained in the record presented to the Board and did not consider any evidence outside of that considered by the Board in making ruling on Berka's motion. The Superior Court acted within its authority and jurisdiction under *de novo review* when it reviewed the evidence as a whole. (Assignments of Error 1-6, 9).

2. The Superior Court applied the proper standard in ruling on Berka's CR 50(a) motion and did not place an erroneous burden of proof on Pilchuck. The Superior Court properly considered all of the evidence in the record and its decision that Berka's left knee condition, proximately caused by the May 2, 2007 industrial injury objectively worsened between November 14, 2008 and August 14, 2009, as a matter of law is overwhelmingly supported by the evidence in the record. (Assignments of Error 1-5, 7-8, 10-11).

3. The Superior Court did not issue a declaratory ruling on Pilchuck's proposed "supervening/intervening cause" instruction, as the Superior Court had not yet considered jury instructions prior to, or after, ruling on Berka's CR 50(a) motion. The court only indicated on preliminary review in connection with the argument of the CR 50(a) motion, that it would not

give the specific instruction proposed by Pilchuck and did not formally rule on any proposed instructions to be given to the jury. A ruling on jury instructions by this Court is premature and would be the equivalent of an advisory opinion. (Assignment of Error 12).

D. STATEMENT OF THE CASE

A Superior Court reviews decisions under the Industrial Insurance Act and questions of law *de* novo. RCW 51.52.115, *Raum v. City of Bellevue,* 171 Wash. App. 124 at 139, 286 P.3d 695 (2012). The granting of a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorably to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. In this context, "substantial evidence" is evidence sufficient to persuade a fair-minded, rational person that the premise is true. *Hawkins v. Diel,* 166 Wn. App 1 at 6, 269 P.3d 1049 (2011), citing *Sing v. John L. Scott, Inc.*, 134 Wash. 2d 24, 29, 948 P.2d 816 (1997), and *Wenatchee Sportsmen Ass'n. v. Chelan County*, 141 Wash. 2d 169,176, 4 P.3d 123 (2000).

This Court reviews determinations of the Superior Court pursuant to RCW 51.52.140. This Court reviews whether substantial evidence supports the trial court's factual findings and then reviews, de novo,

whether the trial court's conclusions of law flow from the findings. *Raum v. City of Bellevue*, 171 Wash. App. At 139.

Berka testified that he started work in the natural gas construction, underground utility field as a laborer, and then went on to become an operator foreman. Prior to the injury involved in this case, he had injuries to his left knee in 1993, 1997, and 1999, all of which were followed by arthroscopic surgeries. The injuries in 1997 and 1999 occurred while he was working for Pilchuck. Berka, 3-6, 7. Berka worked for Pilchuck from 1994 through January 2009. Berka, 6. He held positions as a laborer, truck driver, operating foreman, foreman, and heavy equipment operator. Berka, 12.

After the injuries to his left knee in 1997 and 1999, Berka quickly returned to work at Pilchuck. After those injuries, he testified that he did not feel he had any disability or inability to work. Between 2000 and May 2, 2007, he had no medical treatment for his left knee. His knee was not painful and did not affect his daily activities during this time period. It did not affect his work at all. He did not have to wear a knee brace. Berka, 9,10, 13. All of this changed after the May 2, 2007 industrial injury.

The industrial injury involved in this case occurred on May 2, 2007, while Berka worked as an operating foreman for Pilchuck. His job was to run the crew and operate heavy equipment when needed. Berka,

12. He described the May 2, 2007 industrial injury, and indicated that he felt the onset of immediate pain on the inner portion of his left knee. Berka, 13, 14. As a result of this injury, he worked light duty in the office and in the field, walking and watching his crew until he had surgery. During this time, his knee was very sore, swollen, and he had great difficulty walking. Berka, 15. He had the first claim-related arthroscopic surgery for a tear of the medial meniscus on May 30, 2007.

After the May 30, 2007 surgery, he eventually returned to work as a "walking foreman" for Pilchuck. His job is walking foreman involved walking significant distances ahead of his crew on jobs replacing gas mains, walking great distances up the streets, upstairs, to houses, doing measurements, and occasionally operating heavy equipment. He described one job replacing the gas mains at St. Joseph Hospital, which required him to walk up/down hill several blocks from 11th and Yakima to the hospital, and another job replacing the gas main on North 30th Street hill in Tacoma, from Old Town to Proctor Street. His knee remained sore, he walked with a limp, and his knee would give out after the May 30, 2007 surgery, and it was aggravated especially by the activity of walking. Berka, 16, 18. He worked the walking foreman job up to the date of his second surgery under the claim. Berka, 21.

Berka had his second left knee surgery under this claim on July 30, 2008, again for a tear of the medial meniscus. After this surgery, he returned to work for Pilchuck doing pre-inspections and filling in as a foreman, work which again involved a significant amount of walking. Walking continued to be the activity that particularly aggravated his knee the most. Berka, 37. He worked in this position until he left Pilchuck in January 2009. His knee was disabled the entire time. Berka, 21, 28, 35.

Berka's industrial injury claim closed on November 14, 2008. He was still working for Pilchuck, doing pre-inspections and filling in as foreman. At that time, his left knee was still very sore and frequently swollen. He limped. He testified that it never healed and never got well. Berka, 38, 39. Because the amount of walking was bothering his knee significantly, he contacted Pilchuck employee, Brad Wauldron to express concern that this so-called "light duty" was no easier on his knee than his regular job. He testified that he did this because, "I was ruining my knee." Berka, 39, 40.

Berka's employment with Pilchuck ended on January 27, 2009, when Pilchuck let him go. At that time, his knee was still very sore, swollen, and he testified that it was getting worse day by day. Berka, 42, 43. On February 1, 2009, he and his family left Washington and moved to Arizona because he had some job opportunities there. He arrived in

Arizona on February 3, 2009. Berka, 41. Before he left Washington, he had called the union hall in Arizona to see if there was work available for him. He also contacted a prospective employer called Northern Pipeline prior to leaving Washington. Northern pipeline told him to come to Arizona and they would hire him. Berka, 44.

When he arrived in Arizona, he called Northern Pipeline to let them know he had arrived. He interviewed for the job. They wanted him to start work immediately in the first week of February, 2009. However, because his knee was in such bad shape, painful, sore and swollen, he felt that he needed to rest his knee so he asked Northern Pipeline if he could not start work for one month. It was his hope that the condition of his knee would improve if he took time off. Berka, 44, 88. **He did not start work with northern pipeline until March 2, 2009.**

In February, 2009, prior to starting work at Northern Pipeline, Berka contacted Pilchuck's safety coordinator, Brad Wauldron, specifically to discuss the process of reopening his industrial injury claim. Berka, 46. At that point, his knee was bothering him so much that he could barely walk on some days. At this time, he also contacted the Department of Labor and industries and to get a list of physicians and clinics in Arizona who would treat injured workers under a Washington claim. Berka, 46, 47. He then commenced the process of trying to find

Arizona physician. He eventually found the CORE Institute in Goodyear, Arizona, with Dr. Marcus and Dr. McClure. Berka, 48. He was unable to get his first medical appointment until April 15, 2009 due to the doctors' busy schedules. Berka, 48.

While he waited for his medical appointment, Berka started work at Northern Pipeline on March 2, 2009. He was hired as an equipment operator, not as foreman. He operated a backhoe. His job did not involve walking jobsites, so it was easier on his knee than even his light duty work at Pilchuck. Berka, 50. He testified that he spent roughly 4-6 hours a day sitting in the backhoe, probably 80 to 85% of the day. Berka, 52, 53. He testified that he might have had to I get down into a ditch maybe half a dozen times between March 2, 2009 in September 14, 2009, and always did so with a ladder. Berka, 55, 56. During his time at Northern Pipeline, he did not injure his knee in any way. This work was easier on his knee.

Berka testified that his left knee condition got worse from the time of his surgery in July 2008 forward, and that is why he sought to reopen his claim. Berka, 59, 92. He testified that the work he did at Northern Pipeline did not make his knee worse. Berka, 61. He denies telling anyone, including Brad Wauldron, that his work, or the equipment, at Northern Pipeline, was harder on his knee than the work he was doing or the equipment he was using at Pilchuck. Berka, 87. He testified that his work

at Northern Pipeline was much easier on his left knee than the work at Pilchuck, because it did not involve any significant amount of walking. Berka, 56, 57. He said that the backhoe he operated in Arizona was state of the art, joystick operated by his hands, and was no different than the equipment he operated at Pilchuck. He denied telling Wauldron otherwise. He testified that between March 2, 2009, when he started work at Northern Pipeline, and April 15, 2009, when we finally got in to see a physician in Arizona, his knee condition did not dramatically change. It was already bad. Berka, 85.

Berka testified that the independent examiner, Dr. Kopp, did not take an accurate history regarding his work at his independent medical exam. He stated that in Arizona he was never a foreman, just an equipment operator. He testified that at Pilchuck, he was the operating foreman and walking foreman. Dr. Kopp got it backwards. Berka, 59, 74.

James R. Kopp, M.D. testified by way of a deposition taken on May 10, 2010. Dr. Kopp is a board-certified, actively practicing orthopedic surgeon. Kopp, 5,6. Dr. Kopp testified to having done independent medical examinations for the Department of Labor and industries for proximally five years. Kopp, 9. He treats injured workers in his own practice. He performed an independent medical examination of Berka at the request of the Department of Labor and Industries pursuant to

Pilchuck's protest on June 4, 2009. Kopp, 10. Before the examination, he reviewed Berka's medical records related to his industrial injury. Kopp, 11. The purpose of the examination was to determine whether Berka's industrial injury claim should be reopened due to worsening of his left knee condition. Kopp, 17. To determine this issue, he compared Berka's medical findings from the October 27, 2008 closing examination report with the findings from his own exam. Kopp, 18. He took a complete medical history for Berka's prior medical conditions, and the May 2, 2007 industrial injury. Kopp, 19 – 22.

Dr. Kopp testified as to Berka's work history taken at the time of his exam. He said that he understood that "in Washington he used to run heavy equipment and then was now doing groundwork being a supervisor, tries not to get in and out of the ditches any more than he has to. And when he moved to Arizona he was doing a lot of groundwork as well again avoiding getting in and out of ditches. That's what I understood." Kopp, 23. When he learned that Berka had testified that he may have got the history incorrect and was asked if it made a difference to his opinions, Dr. Kopp listened to Berka's testimony regarding the history, and stated candidly, "Not really. I am presuming that I get the history wrong." Kopp, 31-32. He went on to say, "If my history is wrong, it does nothing but reinforce the fact that the Arizona stuff had nothing to do with this. There

was no injury, no increased symptoms as a result of that, he wasn't doing the same job in Arizona that he was doing in Washington." Kopp, 32-33.

Dr. Kopp testified to his opinion, on a more probable than not basis, that Berka get a straightforward exam with no pain behavior. He found him very credible. He also found two centimeters of the thigh atrophy on his examination of his left thigh and 2 to 3° lack of full extension compared to the right. This was compared to the closing exam which only showed one-half centimeter of thigh atrophy. Kopp, 25. Dr. Kopp testified that the cause of thigh atrophy is the fact that he's not using his leg because it hurts him to do so. He said this was a common occurrence in a patient with a bad knee. Kopp, 25. Dr. Kopp testified that it would take usually several months for this kind of atrophy to develop, and he considered it to be an objective finding. Kopp, 26. When asked if he considered a one half centimeter progression of thigh atrophy to be a significant objective finding Dr. Kopp testified, "absolutely". Kopp, 26.

Dr. Kopp testified that it was his opinion that Mr. Berka's left knee condition worsened between the closing of November 14, 2008 and the date of his examination, that the worsening was objectively demonstrated, and that the worsening was causally related to the May 2, 2007 industrial injury. Kopp, 29, 30. When asked his opinion Dr. Kopp stated, **"That it is related to the 5/2/07 injury from the standpoint**

that without that injury he would not have had the progression." Kopp, 30. Dr. Kopp further testified that Mr. Berka was in need of further medical treatment, and that the cause of that need for treatment was the May 2, 2007 industrial injury. Kopp, 31.

After questioning regarding the discrepancy in the work history reported in his examination report, Dr. Kopp felt that it was not important to the issue of worsening because, **"It really didn't [matter]. Because if you didn't have a knee that was already injured, that activity would not have injured it.** Now with your added history, that's even more reasonable to assume that." Kopp, 33.

During cross-examination he further stated, "So when I say in my conclusions that there is objective worsening, I am equating it to the prior injury, not to an intervening injury". Kopp, 36. **He went on to state, "The activities he did in Arizona, as I have already explained, did not constitute a new injury."** Kopp, 38. When asked about Berka's testimony that while he was in Arizona that his left knee symptoms continued to worsen with both work and non-work activities, he said, **"I can say yes, there was worsening, and there was worsening while he was doing those activities, but I can't say that they caused it because it wouldn't have caused if not for the [5/2/07] injury. That's all I can say."** Kopp, 39. When asked on cross-examination whether the work

exposure in Arizona served as an intervening exposure that would worsen Berka's already pre-existing degenerative knee, Dr. Kopp stated, **"I can't even say that because I - the atrophy that he has took longer - I can't remember what the dates were when he returned to work in Arizona….. There wasn't time enough for him to develop the atrophy from those jobs in Arizona. I think he went to work on 3/2, March 2nd. So to the time of my exam is not enough time to develop the atrophy had. In other words he was already on a downward spiral before he did the work in Arizona. So I can't put the causality on the job in Arizona."** Kopp 39, 40.

Dr. Kopp also offered an explanation as to the presence of the lateral meniscus tear later found in Berka's left knee, and how that related to the medial meniscus injury suffered on may to, 2007. Dr. Kopp stated, "but when you take a meniscus out, then you go out and take out more of it, and then you do with the third time, and the fourth time….. You have a major shock absorber on the inside of the joint that is being progressively whittled away at…. So you have more play on the inside, meaning that there is more laxity…… So just the normal day-to-day activity puts more stress on the lateral side of the knee, too…. That's due to the laxity of the medial joint. That's why arthritis was progressing. **That's the crux of the whole matter."** Kopp 49, 50.

Stacey McClure, M.D. testified by deposition on May 14, 2010. He is an orthopedic surgeon specializing in sports medicine. McClure, 5. He treated David Berka at the CORE Institute, in Phoenix, Arizona. He first saw Mr. Berka on August 5, 2009 after he had been treated by Dr. Marcus from 4/15/09 – 8/5/09. McClure, 7. On examination, he found Berka to have an antalgic gait, meaning he had pain in his left knee with walking, medial joint line tenderness to palpation, positive pain with medial McMurray's test. McClure, 9-10. He ordered and reviewed MRI scans of the left knee, which he felt showed a horizontal tear in the posterior in the body of the medial meniscus, subluxation of the patella, chondromalacia of the medial patella facet cartilage. McClure, 13. He testified into becoming aware of Berka's left knee history before his testimony. McClure, 15. He saw Berka again on September 14, 2009, and recommended surgery. McClure 17, 18. He performed a left knee arthroscopic procedure with partial medial meniscectomy and partial lateral meniscectomy. In the medial compartment, he found a horizontal cleavage tear in the posterior horn of the medial meniscus, and a small radial tear in the lateral meniscus. He testified that the horizontal cleavage tear of the medial meniscus is the injury that happens due to shear stressing, and the radial tear in the lateral meniscus usually happens from a

ripping type of mechanism under load, causing the meniscus to separate like opening up a book. McClure, 19 – 20.

Absent a history of a new traumatic injury, Dr. McClure gave an opinion that the horizontal cleavage tear in the medial meniscus was from poor body mechanics with walking, limping, and he stated, "he's not striking the ground proper foot position. There is a mechanical twisting low throughl the knee and probably sheared the meniscus in that respect." McClure, 21. This opinion was given on a more probable than not basis and in terms of reasonable medical certainty. McClure, 22.

As to causation of the radial tear in the lateral meniscus, Dr. McClure stated, "my opinion of how he could obtain a lateral meniscus tear in addition to the medial meniscus tear is that there is pain on the medial compartment from whatever source. Because of that pain in the medial compartment, he attempts to do what's called an avoidance pattern to keep from putting pressure on that medial compartment, therefore, loading the lateral compartment of, you know, trying to keep weight off the medial compartment; and more probable than not in absence of new trauma, that's how we acquired the lateral meniscus tear. You do not-a tear in the meniscus, whether it's medial, lateral, or whatever, does not require an exorbitant

amount of force. You can tear it just walking down the street." McClure, 22, 34.

Dr. McClure testified to his opinion that Berka's left knee condition objectively worsened between November 14, 2008 and August 14, 2009, and that it was causally related to the may to, 2007 industrial injury on a more probable than not basis. McClure, 33. He also testified that the surgery that he performed on January 8, 2010, was causally related and necessitated as a result of the worsening of Berka's condition due to the May 2, 2007 industrial injury. McClure, 33.

Under cross-examination, Dr. McClure held to his opinions expressed in direct examination. When asked whether radial tear of the lateral meniscus would typically it involves a more definable traumatic injury event he stated, **"No, I cannot say that. We can get a radial tear in the knee from just normal daily activities..... After the age of 20, 25, 30, again, the vascularity the meniscus is so poor, if you stepped off a curb wrong and loaded your need that way you could obtain a radial tear. And I don't consider that a traumatic experience."** McClure 41, 42. Dr. McClure stated that his opinions on causation remain the same if Berka was symptomatic, having pain, swelling prior to starting work in Arizona. McClure, 55.

Brad Wauldron testified for Pilchuck. He worked in the safety department. Wauldron, 5. He said Berka approached him between November 2008 and January 2009 to see about getting a job someplace as a superintendent so he would not have to perform the physical day in and day out work because of his knee. Wauldron, 11. This was while Berka continued to work for Pilchuck. He testified that Berka said his work in Arizona was harder on his knee, required more physical work, all contentions that Berka denies adamantly. Wauldron admits that Berka's light duty job as a walking foreman at Pilchuck involved significant time walking jobsites. Wauldron, 18. He admitted he was having to walk on asphalt, concrete, and other services in people's properties to do his job. Wauldron, 18. He admitted that Berka complained that walking caused him pain throughout the course of his injury and claim. Wauldron, 18.

He recalled Berka contacting him sometime in January or February, 2009 to ask him about the process of reopening his industrial injury claim. Wauldron, 20,26. However, he did not recall Berka discussing the condition of his knee between November 2008 and February 2009, although he admits that they might have discussed the condition of his knee. Wauldron, 21-22,26. He admits Burka was seeking less physically demanding work while he was working for Pilchuck between November 2008 through January 2009. Wauldron, 24.

Wauldron admits that he has no personal knowledge that Berka had an injury to his left knee after March 2, 2009, while working in Arizona, admits that Berka never told him that an injury occurred in Arizona, and says he himself suggested that Berka file a new claim in Arizona. Wauldron, 28. Even on redirect, after significant prodding from Pilchuck's counsel to "clarify" his testimony, **Wauldron testified regarding the conversation with Berka about reopening the claim as follows, "I believe it to be in the end of February. It could have been the beginning of March. The dates are so close."** Wauldron, 39. Either way, conversation occurred before Berka started work in Arizona, or within a very few days of doing so. On recross, Wauldron then testified that the conversation about reopening the claim occurred in January 2009. **He placed this conversation in context by saying, "he originally, when he was still working for Pilchuck, asked me what it would take to reopen a claim."** Wauldron, 40.

Lance Brigham, M.D., orthopedic surgeon testified for Pilchuck. He is not done surgery since 2001, and his practice involves seeing patients one day a week and doing insurance medical examinations 3 1/2 days a week. Brigham, 7. **He was asked to perform a records review on this case by Pilchuck's counsel just two and a half weeks before he testified. He never examined Berka.** Brigham, 10. He never saw any x-

rays or MRI films. Brigham, 28. He reviewed the records confirmed that Berka was having problems on the medial side of his knee, was wearing a brace which attempted to stress the knee more on the lateral side to take strain off the medial side, was still being treated for pain on the medial side of the knee at the time the claim was closed in November 2008. Brigham, 16.

His opinions regarding the condition of Berka's knee after November 2008, were based solely on the erroneous history contained in Dr. Kopp's IME report. Therefore, his understanding was that, "when he was working at Pilchuck... He is an operator and a Foreman. Here in Washington, he mostly operated heavy equipment. In Arizona, he does a lot of groundwork, being in of the ditches. He's it does a lot more work on his knees." Brigham, 16,17. This description of the various jobs is contrary to the record. Brigham's opinion is that the work Berka did in Arizona was the cause his increased symptoms in 2009, but he can't explain it. Brigham, 18.

Dr. Brigham acknowledged reviewing the October 27, 2008 IME/closing report which was used as the basis of the closure of the claim in November 2008. He acknowledged Berka's complaints at the time of knee pain, crepitus when walking, swelling, occasional giving way, and pain levels varying between five and nine on a scale of 10. He had

knowledge to the examiner's medical findings to include positive for left knee pain on tandem walking, left-sided knee pain, palpable crepitus in the patellofemoral joint, left thigh measurement at 47.5 cm, exquisite tenderness on the medial left patellar border, tenderness in the lower patellar pole, exquisite and tarot medial and post arrow medial left tibia femoral joint line, medial joint pain with varus compression on the medial compartment. Brigham, 34-45.

When comparing the finding of two (2) centimeters of thigh atrophy found by Dr. Kopp in his examination to the closing exam, **Dr. Brigham agreed that this was a change representing significant atrophy.** Brigham, 45. He admits atrophy to be an objective finding. Brigham, 47. As to Dr. Kopp's finding of a positive McMurray's test, he testified that that was a quasi-objective test.

When asked the **threshold question of whether or not Berka's left knee condition had worsened** between November 2008 and August 14, 2009, Dr. Brigham stated, **"On, I definitely do."** Brigham, 49. He then acknowledges that the real question is what caused the worsening of Berka's left knee condition. In doing so, **Dr. Brigham acknowledges that the May 2, 2007 industrial injury is a part of his overall condition.** Brigham, 56. He could not say whether prior injuries or the May 2, 2007 injury were the cause of his progressive narrowing of his

medial joint space. He cannot say one way or another and is not offering an opinion on that Brigham, 56, 57. **As to Berka's thigh atrophy, he testified he did not know what caused that condition, but agreed that the several weeks of work in Arizona did not cause that atrophy.** Brigham, 67. **He also testified that he did not know what caused the horizontal cleavage to tear in the meniscus found by Dr. McClure**, but believes it to be degenerative and due to aging of the meniscus. Brigham, 67, 68, 70, 88.

In spite of these admissions, Dr. Brigham testified as an unabashed advocate for Pilchuck, throwing out all efforts at objectivity. As to the discrepancy in history regarding the work Berka did in Washington versus Arizona, rather than accept Dr. Kopp's own admission to taking an incorrect history, Dr. Brigham states, "So, I think we have a difference of truth here." Brigham, 61. He chooses to ignore Berka's sworn testimony that the work in Arizona did not bother his knee, that his knee was worsening before he even went to work in Arizona, or that he talked to his employer about reopening his claim prior to going to Arizona. Brigham, 62-63. In spite of this, he somehow offers an opinion that Berka's work activity in Arizona increased his pain. He bases this assessment solely on the history discrepancy in Dr. Kopp's report and says, "That's all there is to go by. Brigham, 70. Brigham even went as far to say that Berka was

gaming the system because he was familiar with the system, something no other witness has even remotely implied. Brigham, 62-64.

Finally, when asked whether the may to, 2007 industrial injury was a proximate cause of Berka's knee condition, Dr. Brigham begrudgingly stated, "It's a cause". Brigham, 71. He also agreed that in terms of Berka's overall on knee condition, the may to, 2007 industrial injury is a significant cause of his overall problem when he stated, **"Well, I think his surgery for it was yes."** Brigham, 72. Even on redirect by Pilchuck's counsel, **Dr. Brigham could not offer any opinion as to what pathology, if any, was proximately caused by his work activities at the new employer in Arizona and he stated, "Really can't say. Again, we have complaints of a lot of more pain, you got an MRI that shows a horizontal tear. I really can't say."** Brigham, 78. When asked whether he knew what Berka's problem with his knee was, Dr. Brigham stated, **"I don't know. I didn't examine him, sir."** Brigham, 84.

E. ARGUMENT

1. SCOPE AND STANDARD OF REVIEW

RCW 51.52.115 provides for Superior Court review of decisions of the Board of Industrial Insurance Appeals. The hearing in the Superior Court is de novo, and the court is not allowed to receive evidence or testimony other than, or in addition to, that offered before the board or

included in the record filed by the board in the Superior Court. RCW 51.52.115. *Raum v. City of Bellevue.* 171 Wash. App. 124 at 139, 286 P.3d 695 (2012). In an appeal of the Board's decision, the superior court holds a *de novo* hearing but does not hear any evidence or testimony other than that included in the record filed by the Board. *Du Pont v. Department of Labor & Indus.*, 46 Wn. App. 471, 476, 730 P.2d 1345 (1986). Although the Superior Court can only consider the evidence in the record before the Board of Industrial Insurance Appeals, the Court has no limit on the intensity of its review. *Hanquet v. Department of Labor and Industries (1994) 75 Wash. App. 657, 879 P.2d 326,* review denied 125 Wash. 2d 1019, 890 P.2d 20.

This Court reviews determinations of the Superior Court on industrial insurance cases pursuant to RCW 51.52.140, as in other civil cases. This Court reviews whether substantial evidence supports the court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings. *Raum v. City of Bellevue,* 171 Wash. App. At 139. Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n. v. Chelan County,* 141 Wn. 2d 169, 176, 4 P.3d 123 (2000), *Garrett Freightlines, Inc v. Department of Labor and Industries,* 45 Wash. App. 335 at 340, 725 P.2d 463 (1986).

The findings and decision of the Board are presumed to be prima facie correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Department of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983).

The party challenging a determination of the Board of Industrial Insurance Appeals (BIIA) has the burden of establishing by a preponderance of the evidence that the findings of the BIIA are incorrect. *Cochran Elec. Co. v. Mahoney* (2005) 129 Wash. App. 687, 121 P.3d 747, review denied 157 Wash.2d 1010, 139 P.3d 349. The party attacking the findings and decision of the Board of Industrial Insurance Appeals, has burden of persuasion in Superior Court in workers' compensation appeal. *Harrison Memorial Hosp. v. Gagnon* (2002) 110 Wash. App. 475, 40 P.3d 1221, review denied 147 Wash.2d 1011, 56 P.3d 565. The burden of proof is on the party seeking judicial review to overcome presumption that findings of Board of Industrial Insurance Appeals, including resolution of uncertainties in evidence, are prima facie correct. *Vaupell Indus. Plastics, Inc. v. Department of Labor and Industries* (1971) 4 Wash.App. 430, 481 P.2d 577.

The phrase "prima facie" means that there is presumption on appeal that findings and decisions of board, based on facts presented to it, are correct until trier of fact finds from fair preponderance of credible

evidence that such findings and decision of board are incorrect; but if trier of fact finds evidence equally balanced, then findings of board must stand. *Allison v. Department of Labor and Industries* (1965) 66 Wash.2d 263, 401 P.2d 982. The provision that, on appeals to superior court, findings of board shall be prima facie correct and burden of proof shall be on party attacking them, means that if evidence in superior court de novo trial is evenly balanced, findings must stand or, in other words, if trier of facts finds itself unable to make determination because of equally persuasive evidence, prima facie presumption of correctness of findings will control. *Groff v. Department of Labor and Industries* (1964) 65 Wash.2d 35, 395 P.2d 633.

The facts, and medical testimony in the case before this Court overwhelmingly support the Superior Court's decision on Berka's CR 50(a) motion. The Superior Court did not consider any evidence outside the record on appeal, and acted within its authority and scope of its *de novo* review when it ruled on Berka's motion. Pilchuck has not satisfied its burdens of proof on any analysis of the record of evidence.

2. BERKA AND THE DEPARTMENT DID NOT WAIVE THE ABILITY TO BRING A CR 50(a) MOTION AT SUPERIOR COURT AND THE TRIAL COURT HAD THE AUTHORITY TO RULE ON RESPONDENT'S CR 50(a) MOTION/MOTION FOR DIRECTED VERDICT

Trials on Workers Compensation cases in Superior Court are conducted pursuant to the Civil Rules (CR). Per RCW 51.52.115, the hearing in the Superior Court shall be *de novo*, and the statute only limits the trial court in that it cannot go outside or beyond the Board's record and the court cannot receive evidence or testimony other than, or in addition to, that offered before Board. RCW 51.52.115. Although court decisions do not provide clear guidance as to the meaning of a de novo trial, Black's Legal Dictionary gives some guidance as follows: "Trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered". Black's Law Dictionary, Fifth Edition.

When reviewing a worker's compensation case, a court acting in an appellate capacity can evaluate a written record to test conclusions that have been drawn from the facts, and explore the sufficiency of probative evidence. *Garrett Freightlines, Inc v. Department of Labor and Industries*, 45 Wash. App. 335, 342, 725 P.2d 463 (1986). The Superior Court may pass on the sufficiency of the record of evidence and determine whether it is sufficient to give the case to a jury. *Kravelich v. Dep't. of Labor and Industries*, 23 Wash. 2d 640, 161 P.2d 661 (1945).

In the case before this Court, the Superior Court Judge had authority to evaluate the record of evidence as a whole, after hearing and reading each page of the record evidence himself, and make a ruling on

whether a reasonable jury could find that the decision of the Board, which held that between November 14, 2008 and August 14, 2009 David Berka's left knee condition proximately caused by the May 2, 2007 industrial injury worsened and required further necessary and proper medical treatment, was incorrect. The Court did not consider any new issues of law of fact, and considered only such issues as were inherently contained in the record. The Superior Court had authority pursuant to the Civil Rules, to rule on the CR 50(a) motion, and properly found that the record, and all reasonable inferences therefrom, did not contain substantial evidence that would support a verdict for Pilchuck, as a matter of law.

3. THE TRIAL COURT CONSIDERED ALL OF THE EVIDENCE PRESENTED AT TRIAL AND PROPERLY GRANTED THE MOTION FOR DIRECTED VERDICT BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE THAT RAISES ANY MATERIAL CREDIBILITY ISSUES.

The presence of what Pilchuck refers to as "witness credibility issues" alone does not dictate that the Superior Court committed error in granting Berka's CR 50(a) motion. There still must be substantial evidence presented that would support a verdict in favor of the non-moving party. A motion for judgment as a matter of law can be denied only when there is competent and substantial evidence upon which a verdict for the non-moving party can rest. *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wash App. 443 at 454, 158 P.3d

1183, review denied 163 Wash. 2d 1013, 180 P.3d 1290 (2007). A trial court properly grants judgment as a matter of law when, viewing the evidence and all inferences in a light most favorable to the nonmoving partial, substantial evidence does not exist to support the nonmoving party's claims. *Joy v. Dep't. of Labor and Industries, 170 Wash. App. 614,* 285 P.3d. 187 (2012), citing *Schmidt v. Coogan, 162 Wash. 2d 488, 491, 173 P.3d 273(2007).* To be 'substantial', evidence must be sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Joy* at 619, citing *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wash.2d 169, 176, 4 P.3d 123 (2000). When reviewing a judgment as a matter of law, this Court applies the same standard as the trial court. *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC.* 138 Wash App. 443 at 454, 158 P.3d 1183, review denied 163 Wash. 2d 1013, 180 P.3d 1290 (2007), citing *Goodman v. Goodman,* 128 Wash 366, 371, 907 P.2d 290 (1995). The Court of Appeals reviews motions for judgment as a matter of law de novo. *Joy v. Dep't. of Labor and Industries, 170 Wash. App. 614,* 285 P.3d. 187 (2012), citing *Davis v. Microsoft Corp.*, 149 Wash. 2d 521, 530-31, 70 P.3d 126 (2003).

In this case, the Superior Court looked at the entire record, including the complete transcript of testimony of all of the witnesses who testified at the Board on behalf of both parties, and the court properly

adjudged that there was no substantial evidence to support a finding that the Board of Industrial Insurance Appeals had wrongly decided this case. In granting Berka's motion, the Trial Judge stated,

> I am going to grant the plaintiff's [defendant's] motion here for a directed verdict. I think reasonable triers of fact could only conclude based on the evidence in the record, that the prior industrial injury of May 2, 2007, was a cause of the problems Mr. Berka had later. It is possible that something happened....but its always the case that there are possibilities. There's no evidence of that. VRP 6/27/12, at 87.

In reviewing the verbatim report of proceedings, it is very clear that the Trial Court considered all of the evidence, not just those portions of the record where there were disputes between Berka and Wauldron. The Trial Court saw that all of the medical witnesses concluded that Berka's May 2, 2007 was the proximate cause of the worsening of his left knee condition between November 14, 2008 and August 14, 2009, and the proximate cause of his need for further necessary and proper medical treatment, and that but for the May 2, 2007 industrial injury Berka's left knee condition would not have deteriorated as it did between those dates. The court considered the testimony as a whole.

The Trial Court granted Berka's motion because the record as a whole compels one conclusion, as a matter of law: that there was no legally sufficient evidentiary basis for a reasonable jury to conclude that

the Board of Industrial Insurance Appeals was incorrect in deciding that between November 14, 2008 and August 14, 2009, Berka's left knee condition proximately caused by the May 2, 2007 industrial injury had worsened and was in need of further treatment.

This conclusion is compelled, even when one gives credence to Pilchuck's baseless hypothetical of an undocumented and unreported injury, or relevant injurious work exposure, in Arizona between March 2, 2009, the date Berka started work in Arizona with his already disabling and deteriorating knee, and April 15, 2009, the date he finally was able to get medical attention in Arizona and file the application to reopen his claim. This conclusion is supported even by the reluctant, tortured opinion of Pilchuck's only medical expert, Dr. Brigham. On the facts in this record, to find for Pilchuck a trier of fact would have to base its opinion on pure speculation and throw out the overwhelming weight of credible medical and lay testimony. Having read each and every page of he record of evidence in this case, the Trial Court recognized that fact and ruled accordingly.

4. THE TRIAL COURT APPLIED THE APPROPRIATE BURDEN OF PROOF WHEN IT FOUND THAT THERE WAS NO SUBSTANTIAL EVIDENCE UPON WHICH TO SUPPORT A VERDICT FOR APPELLANT PILCHUCK AND GRANTED THE MOTION FOR DIRECTED VERDICT

Berka's left knee was symptomatic, swollen, disabling, painful, and worsening when his claim closed on November 14, 2008. Berka, 38, He testified that the light duty work he did for Pilchuck from July 2008 until he left their employment, just walking, was ruining his knee, making it worse day by day. Berka 26-37. Berka began exploring the reopening of his claim, based on the worsening condition of his knee, just shortly after her left Pilchuck's employment on 1/27/09, before he left for Arizona on February 1, 2009, and before he ever commenced work in Arizona on March 2, 12009. Berka 39, 45. He took affirmative steps to get his claim reopened, called the Department, obtained the name of an Arizona doctor to treat him prior to starting work in Arizona. Berka 46-47. At this time, his knee was painful, swollen, and getting worse. Berka 42. Berka adamantly denies that he suffered any kind of injury to his already disabled and ailing left knee while he was in Arizona. Berka 55-56. He delayed his start date at work in Arizona for a full month specifically to rest his disabled knee. Berka 44. He denies that the work in Arizona, once he started, made his knee worse than activities of daily living, and denies telling Brad Wauldron that it did. Berka 56. He denies doing any activities that injured, or was harder than normal on his knee, in Arizona. Berka 55-56.

In addition, the agreed upon facts of his actual work duties and job titles in Washington versus Arizona reveal and clarify the discrepant history taken by Dr. Kopp. Berka 49-50,59. Wauldron's testimony supports Berka's clarification of his work duties and jobs in Washington versus Arizona. Wauldron 7, 13, 17. This testimonial clarification sheds light on and renders the discrepancy in the history insignificant in terms of proof, and eliminates this witness "credibility" issue relied on by Pilchuck in its contention of error by the Trial Court.

This witness 'credibility issue' does not rise to the level of "substantial evidence" when it is scrutinized and put to the test. Dr. Kopp accepted that he just got the history wrong. Kopp, 32. In fact, Dr. Kopp said the corrected history only reinforced his opinion that the activity in Arizona, whether work-related or otherwise, had no material impact on the worsening of Berka's left knee condition. Kopp, 32-22. Dr. Kopp ultimately found the discrepancy in history insignificant and non-dispositive on the medical issue of the cause of the obvious worsening of Berka's left knee condition. Kopp, 32. Dr. Kopp gave an opinion of but-for causation as to the May 2, 2007, industrial injury when he stated, "Because if you didn't have a knee that was already injured, that activity [in Arizona] would not have injured it." Kopp, 33,38-39. The opinions of Berka's other medical witness, his treating orthopedist, Dr. McClure, are

in agreement with Dr. Kopp and also fully support the correctness of the Board's decision, and the Superior Court's ruling on the CR 50(a) motion.

Pilchuck's only medical witness, Dr. Brigham offered no actual opinions on the issue of what caused Berka's worsening, or what Pilchuck refers to as "new conditions". Rather, the only opinion he expressed on a more probable than not basis, was his reluctant admission that the May 2, 2007 industrial was certainly a proximate cause of that worsening. This opinion makes Berka's case on its own. Dr. Brigham stands alone in his attacks on the credibility of Berka's testimony, and he bases his attack on what Dr. Kopp refers to as an innocent "mistake" Dr. Brigham alone cannot create a witness credibility issue of any substance.

The Trial Court reached these same conclusions after its thorough review of the entire record. There really is no material credibility issue raised by Pilchuck that makes the Superior Court's decision error. Once this alleged witness 'credibility issue' is scrutinized and revealed, it is apparent that the Trial Court did not apply an erroneous burden of proof, did not erroneously weigh the conflicting evidence, and did not require that Pilchuck present specific evidence of a new injury as alleged when it ruled on Berka's CR 50(a) motion. Rather, the Trial Court merely held Pilchuck to its obligation under CR 50(a), to support its contentions and theories of causation with "substantial evidence". To meet this obligation

of proof, Pilchuck is not entitled to rely on pure speculation, conjecture, and unsupported and self-serving attempts to obfuscate the truth.

5. THE APPELLANT IS ASKING THE COURT FOR AN ADVISORY OPINION ON THE ISSUE OF A SUPERVENING CAUSE INSTRUCTION AS JURY INSTRUCTIONS HAD NOT BEEN PRESENTED TO OR ARGUED TO THE TRIAL COURT **AND** THE FACTS OF THIS CASE, THE PROOF PRESENTED AT TRIAL, AND *MCDOUGLE V. DEP'T OF LABOR & INDUS.* AND THE BOARD DECISIONS CITED BY THE APPELLANT DO NOT SUPPORT GIVING AN INSTRUCTION ON SUPERVENING CAUSES.

Berka has provided overwhelming evidence of aggravation and worsening of his left knee condition such that his claim should be reopened pursuant to our RCW 51.32.160. It is submitted that he has met each and every element required to uphold the board's decision reopening his claim. The testimony of Dr. Kopp, 25-30, and Dr. McClure, 33, and Dr. Brigham, substantiate the necessary showing of worsening and comparison to the baseline condition at the time of the first terminal date, November 14, 2008, based on significant objective medical findings. Berka has also overwhelmingly satisfied his burden of proving, by competent medical opinion, expressed in terms of reasonable medical certainty and on a more probable than not basis, that his May 2, 2007 industrial injury was the proximate cause of the worsening of his condition between the terminal dates. Kopp, 32,33, McClure, 21-22,33. Berka has more than met the burden of establishing proximate causation under WPI

155.06, 5th Ed. Pilchuck stipulates that Berka has met the burden of proving that his left knee condition has worsened between the terminal dates. Pilchuck Brief, 44.

Berka has also squarely and fully addressed what Pilchuck references to be the material question decided by the Superior Court, that being the identification of what Pilchuck refers to as "increased and new objective findings" and the proximate cause of those findings. McClure, 20-23, 33,35, Kopp, 49,50. Specifically, Dr. Kopp and Dr. McClure testified, on a more probable than not basis, to their opinions that the horizontal cleavage tear found by Dr. McClure in Berka's medial meniscus and the tear in the lateral meniscus were due to the abnormal and excessive loading on the knee caused by the May 2, 2007 industrial injury and the removal of the medial meniscus from surgical procedures that were performed in 2007 and 2008. Kopp, 49,50, McClure, 20,21-22,55. Berka's "new findings" are part and parcel, a continuation, of his May 2, 2007, industrial injury and its unfortunate and relentless progression between November 14, 2008 and the present.

The record in this case establishes that Berka's situation satisfies the "reasonably expected conduct" test for a worker with his known disability cited in *McDougle v. Dep't. of Labor & Industries,* 64 Wn. 2d 640, 393 P.2d 631 (1964), and proximate cause analysis by the Board in *In*

re: Robert D. Tracy, BIIA Dec., 88 1695 (1990), *In re: Susan T. Walker,* Dckt. No. 95 2673 (May 15, 1996). Berka had never been told not to work in his chosen occupation and industry by any physician, and such work was the kind activity that he would reasonably be expected to do, even with his disability. In fact the work he did in Arizona was not as hard as the work he had left at Pilchuck, with the daily, extended walking. Further, it was the daily activity of walking itself that really aggravated his knee from November 2008 through the present. Berka, 37,39-40.

There is no substantial evidence of a supervening or intervening cause or injury and therefor no basis to give such an instruction. There is simply no competent proof of any other cause, unreported injury or exposure as Pilchuck alleges. When assessing the Superior Court's ruling on Berka's CR 50(a) motion, it must be kept in mind that Pilchuck's own medical witness, Dr. Brigham offered no medical opinion at all as the proximate cause of the "new pathology" alluded to by Pilchuck. He specifically stated he had no opinion on this issue. Brigham,78, 80, 84. The fact that something could have happened, or could have aggravated his condition, does not create substantial evidence of a supervening cause, nor does it eliminate the May 2, 2007 industrial injury as the proximate cause of the worsening of his knee condition. Berka's knee began to worsen before he left Pilchuck, continued to worsen before he left

Washington, and before he started work in Arizona. Berka, 18-22, 28-33. To find otherwise, one would have to ignore the known history and progression of his condition prior to his commencing work in Arizona.

If this Court determines that the Superior Court erred in granting Berka's CR 50(as) motion and reverses and remands this case for a new trial, no instruction regarding Pilchuck's proposed supervening cause instruction should be given to the Superior Court. First, the issue is premature and not yet before this Court. The Superior Court had not received both parties' sets of jury instructions, and jury instructions were not yet before the court and were not argued. In fact, the only instructions the court has received are those submitted by Pilchuck during the argument on the CR 50(a) motion. The Superior Court never received Berka's proposed set of instructions had not yet been submitted and they are not part of the record. CP1-2. VRP 6/27/12 59-88. In fact, Berka's motion pre-empted the formal submission, argument, and decision on instructions. VRP 6/27/12 59 ll. 22-25. Hence, contrary to Pilchuck's assertion, the Superior Court has **not** already ruled on Pilchuck's proposed instruction. In addition, the Superior Court did not say that it would not give a supervening/intervening cause instruction generally, only that it would not likely give Pilchuck's specific proposed instruction on this issue. The Court only said it would not give, "the one he proposed". VRP

6/27/12 88 ll. 10-21. This does not rule out the possibility that the Superior Court would give another, differently worded, instruction after the formal submission of instructions by the parties and argument before the court. This did not occur.

Pilchuck is, in essence, asking this Court to render an **advisory opinion**, something that appellate courts are reluctant to do. *Clallam County v. Dry Creek Coalition,* 166 Wash. App. 366, 255 P.3d 709 (2011), *Kitsap County Prosecuting Attorney's Guild v. Kitsap County,* 156 Wash. App. 110, 231 P.3d 219 (2010).

Second, the facts of Berka's case, and the cases cited by Pilchuck do not support the giving of a supervening cause instruction. All of the cases cited by Pilchuck involved injured worker's whose conditions were aggravated by a specific event that was determined to be a new, intervening injury under the law. For instance, *In re: Robert D. Tracey,* BIIA Dec., 88 1695 (1990), was a case where the injured worker, Mr. Tracey, applied to reopen his claim seven months after it had been closed by the Department with a determination of no permanent impairment for his low back injury. Mr. Tracey testified that he was washing and waxing his van at home, and that he was stretching up making a big swirl when he had the sudden onset of pain and cramped up. The Board found that he did not prove, by a preponderance of medical opinion evidence, that a

proximate causal relationship existed between his industrial injury and the subsequent disability resulting from the new event, washing and waxing his car. The key was that Tracey did not prove that but for the industrial injury, he would not have experienced the increase in pain and disability. Thus, the Board found the denial of the reopening of his claim by the Department was correct. *In re: Robert D. Tracey,* at 8. All of the other Board cases cited by Pilchuck in its brief to the Superior Court speak to specific, identifiable intervening events that were the proximate cause of the worsening of aggravation of the respective injured workers' conditions. *In re: Joseph B. Scott,* BIIA Dec., 05 2069, 06 16536 (2008) – buffing multiple cars, *In re: William R. Dowd,* BIIA Dec., 61 310 (1983) – hit by a falling tree, *In re: Richard Davies,* BIIA Dckt. No. 07 11118 07 11119 (2008) – highly repetitive strenuous pulling machine lever 45-70 per day. CP 20-24.

This is not Berka's case, in that there is no proof of a new, specific event or activity that aggravated and worsened his left knee condition, independent of the May 2, 2007 industrial injury. In fact the proof is overwhelming that his knee condition was worsening all along by daily activities that he was reasonably expected to do, especially walking, before he even went to work in Arizona where Pilchuck's alleged unreported, undocumented injury or exposure occurred. Unlike, *Tracey,*

and the other cases cited by Pilchuck, there is zero proof of an intervening, supervening cause to explain Berka's continuing, progressing left knee disability, and all medical opinion points to the May 2, 2007 industrial injury. Hence, there is no substantial evidence of a supervening, intervening cause of Berka's worsening knee condition to justify such an instruction.

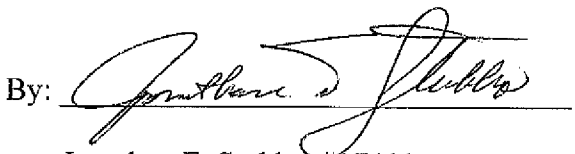
Finally, a supervening cause instruction is not necessary to allow Pilchuck to argue its case. Pilchuck can adequately argue its position under the correct statements of the law contained in WPI 155.06 (5th ed.), and 155.11 (5th ed.), and 155.11.01 (5th ed.), and the facts contained in the record on review. No supervening cause instruction is needed, or warranted under the facts of this case should this case be remanded for trial.

F. CONCLUSION AND REQUEST FOR AWARD OF ATTORNEY FEES PER RCW 51.52.130 AND RAP 18.1

Respondent Berka respectfully requests that the Court affirm the Superior Court's Order Granting Defendant's Motion for Directed Verdict or Judgment as a Matter of Law. In addition, Respondent requests that the

Court award Attorney Fees and Costs to the Respondent as authorized under RCW 51.52.130 and RAP 18.1.

RESPECTFULLY SUBMITTED this 2nd day of April, 2013.

By: 

Jonathan F. Stubbs, #17411
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April 02, 2013 - 4:28 PM

Transmittal Letter

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COURT OF APPEALS

THE STATE OF WASHINGTON

DIVISION II

PILCHUCK CONTRACTORS, INC., Appellant, v. DAVID BERKA AND THE DEPARTMENT OF LABOR & INDUSTRIES, STATE OF WASHINGTON, Respondents.	No. 43837-2-II CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2013, I filed and served the **Respondent's Brief and this Certificate of Service** upon the following parties to this matter:

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DATED this 2nd day of April, 2013, at Tacoma, Washington.

Cortney E. Henington

JONATHAN F STUBBS

April 02, 2013 - 4:30 PM

Transmittal Letter

Document Uploaded: 438372-Cert of Service of Brief.pdf

Case Name: Pilchuck Contractors, Inc. v. David D. Berka and the Department of Labor and Industries, State of Washington

Court of Appeals Case Number: 43837-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Certificate of Service

Comments:

No Comments were entered.

Sender Name: Jonathan F Stubbs - Email: **jfstubbs@jfstubbslaw.com**

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